UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-reg Chapter 11
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	(Jointly administered)
Debtors.	.	One Bowling Green New York, NY 10004
	.	Tuesday, September 24, 2015 2:36 p.m.

TRANSCRIPT OF EVIDENTIARY HEARING RE: REQUEST FOR STAY PENDING APPEAL RELATED TO MOTION FILED BY WILMINGTON TRUST COMPANY, AS GUC TRUST ADMINISTRATOR AND TRUSTEE, FOR AN ORDER GRANTING AUTHORITY (A) TO EXERCISE NEW GM WARRANTS AND LIQUIDATE NEW GM COMMON STOCK AND (B) TO MAKE CORRESPONDING AMENDMENTS TO THE GUC TRUST AGREEMENT

BEFORE THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY COURT JUDGE

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(Proceedings commence at 2:36 p.m.)

(Equipment malfunction - indiscernible)

(Recess taken at 2:42 p.m.)

(Proceedings resume at 2:57 p.m.)

THE COURT: Have seats, please. Okay, Mr. Rubin. Before we took the recess, you were going to look at the proposed demonstrative. And I don't know if you're continuing to object to it or not. Why don't you tell me what your thinking is with respect to it?

MS. RUBIN: Your Honor, we do not wish to continue an objection to the use of Mr. Weisfelner's demonstratives. We've had an opportunity to consult with Mr. Weisfelner and understand the basis for it, and we withdraw the objection. We thank Your Honor for giving us the time to consider what went into this demonstrative.

THE COURT: Okay. Good enough. All right, then. Back to you, please, Mr. Weisfelner.

MR. WEISFELNER: Your Honor, thank you. And Your Honor, I want to make sure that the Court and the parties understand what our demonstrative indicates. And again, I promise to walk through the Court through the derivation of all the numbers based on the evidence. But our point is that the calculations contained herein would show a supersedeas bond depending on the length of the appeal, from a low of $2.2 million for a four-month appeal to a maximum of $6.6 million

for a 12-month appeal.

Your Honor, we perceive these as being the maximum bond that one could possibly calculate based on the evidence that Your Honor has heard. And for the reasons I'll articulate, we believe the bond ought to be substantially less, if there is a bonding requirement at all. And let me tell you now how we got to our numbers. If Your Honor has -- and if you don't, we'll supply it to you, a copy of the Supplemental Exhibit C-1 that was used during Mr. Scruton's testimony.

THE COURT: Uh-huh.

MR. WEISFELNER: And if Your Honor has it, you'll see that for the S&P 500 Index, which was the index utilized by the witness to represent potential investments in large cap asset class. While Mr. Scruton used the 2012 numbers, the 15.99 percent return, he acknowledged that the mean of the years, but only the ten years -- I'm sorry, I think he took into account yield to date 2015 as well, came up to 8.29 percent, which is reflected in the Scruton Supplemental Declaration mean column.

We then asked him some questions about that return, and in particular on page 70 of the transcript, you'll see that we were talking about returns for the S&P. And what we asked was:

"Q Is it your expert testimony, sir, that utilizing 2002 returns is more predictive of the rate of return that a hypothetical investor in the S&P Index would realize and more

reflective than the mean of the last ten years?"

It was a compound question, so I went down and then said:

"Q As between utilizing the 2012 rate and utilizing the mean over the last ten years, which in your expert opinion is more reflective of the likely rate of return for a typical investor in the S&P 500 Index?"

The answer at the bottom of 70 through the top of 71 is:

"A The likelihood of return more likely to happen would be best reflected by the mean for the last ten years rather than just that one year you selected. I agree."

Your Honor, subsequently we showed the witness our Exhibit B, which is also in evidence, or I think it was evidence subject to a reservation of rights --

THE COURT: Was that B, Bravo?

MR. WEISFELNER: B, Bravo, correct. Where we demonstrated that the current or more current ten-year average for the S&P 500 Index was 6.93 percent. And what the witness told us was that he thought the difference between 6.93, that reflected in our Exhibit B, and 8.29 reflected in his Exhibit C-1 was a function of timing, that our Exhibit B reflected more current numbers than his numbers.

THE COURT: Which was more current? Forgive me.

MR. WEISFELNER: Our number reflected in Exhibit B

showing a mean for the S&P 500 Index, for the most current available data, at 6.93 percent as opposed to his 8.29 percent. Your Honor, we couldn't find recent examples of the Bank of America Merrill Lynch high grade master index used as a proxy for fixed income investors, so we stuck with the 5.2 percent mean number reflected in the Scruton supplemental Exhibit C-1.

As to the Credit Suisse event driven index, and Your Honor, I would submit this is the most critical index, as neither side contests the likelihood that the majority of units are currently held by hedge funds, and that the Credit Suisse event-driven master hedge index was probably best reflective of the current investor group.

Well, Scruton told us during his testimony as reflected in C-1 that the ten-year mean, straight average, was 6.64 percent. But then we showed him in our Exhibit D as in dog, a printout from Bloomberg which reflected that the ten-year average, taking into account the most current information available, including year-to-date figures for 2015, was not the 6.64 figure he used, but rather than 5.8 figure reflected in our document.

Your Honor, I would invite your attention to -- I think it's page 163 of the transcript. And on 163 -- beginning at the bottom, I'm sorry, of 162. My question:

"Q So turning back to C-1, with that testimony in mind, and just focusing on Credit Suisse, it's your testimony that the

annual rate of return going back to 2006, that being 16.38 percent, is more predictive of the protection rate that high-yield bond holders need than" -- it says "driven hedge funds than is, for example -- and I'll pick them off, you tell me, yes, that's better than what I'm about to say -- is, going back to 2006 for 16.38 percent annualized return in that year, in your judgment, more predictive than what those hedge funds are likely to earn during the term of a stay than is the year-to-date figures for this calendar year? Which is more predictive?"

His answer:

"A It's difficult to assess which is more predictive. As I've said, the -- when you look -- take a" -- it says "trained" mean," I think it should read "trimmed mean" -- "or a mean type of approach or a midpoint type of approach, that is more predictive in the sense that it's the most likely outcome."

Your Honor, finally, for the ten-year U.S. Treasury yield curve, C-1 has a 3.22 figure. We showed the witness, you may recall, Exhibit C, the yield curve for ten-year treasuries, showing a mean of 2.2 percent, or showing a current yield on the curve at 2.2 percent. And again, the testimony from the witness is that he thought that was more reflective of the likely returns than was the number he chose, which dates back to 2005. Perhaps the most critical testimony that we heard on these topics came in response to Your Honor's question. This

is at page -- I believe it's 180 of the transcript, where Your Honor asked, and I quote:

"Do you believe that the yield on debt instruments over the next four months to 12 months is going to get as high as 5.20 percent for quality obligations?"

Your Honor, that's the one index for which we didn't have current information, so I left it at the 5.2 percent mean that Scruton indicated on his own exhibit.

The answer to Your Honor's question was:

"Again, I believe that -- this is just a mean calculation based upon historical information. It's not necessarily predictive of what's going to happen the next few months."

"Uh-huh."

"A I mean, if I was to guess, I would suggest that the mean is an overstatement of what's going to happen on a most likely basis, but it's one of the measures -- it's -- remember, it's not a measure I use to calculate my analysis, it was just another measure."

Your Honor, there are any number of problems with the opinion that was offered. The record reflects that this was the first expert opinion proffered by this witness over the last ten years. Importantly, it's not FTI's opinion. It's Mr. Scruton's personal opinion. He never used this methodology before, methodology being "let's pick the third highest return over the last ten years, leaving out this year's year-to-date

returns," and he's not aware of that methodology ever being used before.

Now, Your Honor, I indicated that we thought that the numbers reflected on our demonstrative were high, and they're high for at least the following reasons:

The numbers used here ignore the fact that in today's volatile market investors may choose not to invest either all of the money they receive at once or within the indices that are reflected on this chart.

Your Honor, it's also I think an overstatement of what the proper bond should be, if any bond, because it reflects a difference between what could be earned and the GUC Trust current investment, which we know to be assumed at .12 percent.

We also know from the witness's own testimony that under the terms of the GUC Trust agreement approved as part of the plan, there are other permitted investments that, as the witness has testified, could return as much as ten times the return that's currently being realized.

Your Honor, the GUC Trust has put forward no evidence as to why it's sitting earning .12 percent, which I think is interesting, because while you're being told that a protective rate is some 12 percent, and I'm suggesting to you that the rate really can't be any higher than 1.65 percent, 1.65 percent, they're currently earning .12 percent. Which is more

reflective of future earnings than what they're currently investing in? .12 percent returns. And, Your Honor, interestingly --

THE COURT: Pause, please, Mr. Weisfelner. How does that .12 percent correspond to what Kurtz found when he made a similar analysis in Tribune? My memory is that in Tribune, the debtor -- this is Judge Carey's case, --

MR. WEISFELNER: Right.

THE COURT: -- of course, not mine -- was getting comparably low yields.

MR. WEISFELNER: Sure. And Your Honor, again, you're absolutely right. What Kurtz did was he took what he presumed to be the right return on investment assumption, which he took out of the Credit Suisse high-yield index, yield to worst, what a bond was expected to pay, including prepayment but not anticipating defaults on the bond, and used that as the appropriate rate, which Mr. Scruton rejected in this case.

And yes, Your Honor's right, that Kurtz then did a subtraction based on what was currently being earned.

My point is, and it goes to Your Honor's question, at the very end of the testimony, if you look at the four indices that we have here and you look at the S&P 500 Index, I don't know about Your Honor, but I've got a bunch of money in a 401K and a retirement program. And I've got to tell you, while the mean over the last ten years was 8.29 percent, that's not what

I earned last year and it's not likely to be what I'm going to earn this coming year. 8.29 percent in this stock market?

Likewise, if I go down to the high grade bonds, Your Honor asked, "Are we likely to see 5.2 percent returns on high-yield bonds?" The witness said, "No."

Likewise, if I look at Credit Suisse high-yield junk bond index, given that the year-to-date returns was negative, is it reasonable to expect that over the next 12 months they're going to earn six percent? Same for the money market or Treasury yield.

You know, Your Honor, it occurs to me -- and if you give me a second, I think I'm formulating a position that maybe resolves this whole case.

I'll make an offer. Deny our request for a stay. Let them make their distribution in November. If I'm successful on appeal, I want to make sure I can get my money back. And I want to be able to get my money back with a reasonable rate of return. I'm telling you that the lowest rate of return is five percent. Cut that in half. Make them return the money to me at two and a half percent.

It's like a reverse mortgage. I'm a class action. I represent thousands of innocent parties that were damaged by GM's fraudulent concealment and knew GM's continued fraudulent concealment, which has now been admitted as a matter of the record.

I'm contending that on appeal, in order to get me to ten cents, if I hit a home run on proving up our damages, the best I'm ever going to do if I suck up all the cash that's in the bank and all the money that's in the accordion is ten cents on a dollar, compared to the 30 cents they've already recovered.

Let them take their money in November, when it's otherwise supposed to be ready to be taken. But if I succeed on appeal, I want an undertaking that I'm going to get the money back, and I'll take the money back at a ridiculously low -- based on their own testimony -- two and a half percent interest, because I think that's a great investment for us.

You show me an investment that you can make a two and a half percent guaranteed and I'll take it every day. But Your Honor, I don't want to seem facetious. I'm thinking about it as I'm standing here. Your Honor is being asked to assume what the right rate of return is. I call their bluff. They can keep every dime of recovery over two and a half percent. Keep it. They earned it; keep it.

Return the money to me with an undertaking from these hedge funds that if I'm successful on appeal they'll return the money. I won't have to chase it. I won't have to trace it. It will be simply a matter of calling on a letter of credit with a two and a half percent interest.

And Your Honor, I suggest to you that that offer --

and I apologize for not thinking of it earlier, but that offer and its ultimate refusal by either the GUC Trust administrator or by the hedge fund themselves, is indicative of what they think they're going to be able to earn on this money.

Understand something else, Judge. If you let them take the $135 million, that represents a four-cent -- I'm sorry, four-tenths-of-one-cent return. And what distinguishes I think our case from Tribune, for example, is this is not a zero sum game. In other words, a bunch of creditors who are looking for recovery, either they're going to get the recovery out of the Trust or the recovery is going to get stayed.

These investors hold an underlying investment piece of paper called a "unit." Now just think about it logically. You have the unit. It trades in the open market at some price.

Well, Your Honor, if they take the interest payment or they take the distribution in November, what should that do to the trading value of that unit? Theoretically, if you'd gotten money off the top, then the ultimate trading value of that unit ought to go down, because in effect you've clipped a coupon, you've taken a dividend.

If instead Your Honor directs no distribution out of the Trust, then one would suspect, all other things being equal, that the market value of those units will remain the same or go up. That's what distinguishes our case from the Tribune case, where it was all or nothing. Either you get it

or you don't get it. There's no underlying security that synthetically represents the totality of your entitlements over time.

Your Honor, you know before the GUC Trust decided voluntarily, on its own application, to convert all of the GM stock and warrants into cash, and then sometime in August, I guess, invest the cash at .12 percent, they were holding on to GM securities. And we would have had a much easier time trying to predict what the return on GM securities were.

They chose to convert into cash. They chose to invest it in a mix of short-term securities. You got no evidence, based again on the original GUC Trust agreement, as to why they can't take that money, some $800 million, most of it in reserves, and put it into a different permissible investment.

They say, well, we don't want to trip over, be an investment company. Really? Why not go to the SEC and ask for a no-action letter, if you're so concerned? And by the way, there's nothing that says you will be an investment company. The documents merely reflect their concern that they might be treated as an investment company. Their choice not to seek a higher return.

Your Honor, I want to deal with a couple of other issues that have been raised time and time again. And the most important one, from my perspective, is two things. Number one,

we failed to hold up last November's distribution, a distribution that Your Honor indicated on the record had I come to ask you for it, that being a stay, you would have granted it, quote, "in a heartbeat."

Now, Your Honor, I think in your own equitable mootness determination, you determined that it was a close call. But what you perceived to be our strategic decision not to pursue a stay tipped you over the edge. To add to that both of my adversaries the day before yesterday argued that we don't have any claims, we never filed claims in this case, and we ought to be held to an understanding and determination that we're not creditors because we chose not to file a claim.

Your Honor, in the scheduling order regarding the motion of General Motors to enforce the sale order, there was a stipulation that was entered into because we were concerned about just this implication. And by order dated May 16th, 2014, Your Honor ordered that:

> "The GUC Trust agrees that it shall not assert a timeliness objection to any claim that the Plaintiffs may attempt to assert against the old GM bankruptcy estate and/or the GUC Trust based directly or indirectly on the ignition switch issue as a result of the Plaintiff's delay in asserting such claims during the interval."

Interval was defined as "the date of this order,"

which again I think was May, May of 2014, "and the entry of a final order," final order meaning the entry of an order by a court of competent jurisdiction, and there are no pending appeals, and the time period to file an appeal has expired.

They agreed and were ordered not to raise the no filing of a claim. The chutzpah of both of them to keep telling Your Honor that I ought to be prejudiced or Your Honor ought to draw negative inference from the fact that I haven't filed a claim.

We anticipated this, and we thought we had an agreement that it wouldn't be raised, going back to May. But because they have nothing else to argue, they tell you that that's an important criteria.

Your Honor, there should be no bond in this situation, for the following reasons: The highest possible percentage based on a mean, which their own witness testified is a better indication of likely recoveries than the third highest number for the four indices, indicates that the right percentage is 5.03 percent.

And that again takes into account giving them the benefit of the doubt on the lowest possible earnings they could get from their own investments.

It takes into account, or assumes, that an investor gets the money and invests it all at one time, in today's volatile market.

And it assumes across all four indexes -- and I don't care if you're a hedge fund or you invest in Bolivian bonds, if I thought I could get five percent over the next six months in today's market, please show me where I can invest my money at five percent. You can't. Which is what gave rise to my offer. Give them the money, but make sure they account to me for who got the money, and return it to me if my appeal is successful at half that rate, two and a half percent.

They won't take that offer because they know they're not likely to make any money on that bet. Hedge funds who want to make money and profit on their investments, not the customers of GM, not the employees of GM, not the innocent creditors that were injured because -- or who suffered because GM went through a bankruptcy and a 363 sale. Hedge funds who made a wide open investment after the fact.

In every GUC Trust report since May of 2014, the GUC Trust had advised unit holders that because of the recall, your ultimate distributions may well suffer significant dilution. It wasn't a surprise to these sophisticated investors that could happen. It was a known, reported fact. They could have traded out of their units. Many of them, I think, doubled down on their investments, but we don't know. Which gets me to negative inferences.

There are three bases upon which we ask Your Honor to make a negative inference. One is no compliance with 2019.

Number two is because of the discovery dispute we had with Akin Gump -- and Your Honor is right, that I have occasion every once in a while when I'm lucky to represent hedge funds.

THE COURT: On occasion?

MR. WEISFELNER: On occasion. And I tend to know what they will or won't do. And sometimes we work these things out by having them report in the aggregate. In this case, we were told, you're getting none of the information, ask the judge to make whatever inference you think you can get him to make.

But more significantly, Your Honor, the expert told you that getting some basic information from the hedge funds would have been relevant to his calculation. He went to the hedge funds and asked them -- well, he kind of asked them because he says he knew in advance he wasn't going to get any information, even though it was relevant. And they told him no.

The hedge funds are the real parties in interest here. And the hedge funds have done nothing to facilitate the finding of fact in this court of equity. Instead they say, we're not telling you, too bad.

Well, think about what happens in this ultimate chess game. Let's say Your Honor denies the stay. We go forward on our appeal and we're successful. Won't a court of competent jurisdiction want to understand where the money went to that we

were supposed to get, instead of them getting the distribution, in order to half -- not even halfway, one third of the way even us up? Don't the hedge funds then have to report to you what they made on their investment?

THE COURT: Pause please, Mr. Weisfelner. Everything that you've told me at least -- I don't know what you've told the Circuit or will tell the Circuit -- is focused on availing yourself of the accordion feature, which would put new value into the GUC Trust.

And your contention, at least in what I saw, was that I had insufficiently taken the accordion feature into account. But what you're trying to access with the 135 million, and then the downstream cash payment -- I think in aggregate they totaled up to about two forty-four -- isn't vis-a-vis funds that could be obtained by reason of the accordion feature stuff that was already within what I'll call the GUC Trust and investor mix. It's old money, not new money.

What is your legal theory for getting the old money back, given what I said about the reasonable expectations of GUC Trust investors with which I thought in openings you were generally in agreement with?

MR. WEISFELNER: Your Honor, to quote one of my adversaries, "I'm glad you asked that." Because, Your Honor, there is a clear distinction between the accordion feature, where I think we stand on very solid ground that no one could

trip the accordion feature but for our claims, and therefore we should be entitled to a right to trip that accordion feature and then realize the entire distribution.

My point is that if you took all the money in the accordion feature, and I think the maximum amount we could ever get in the accordion feature is something shy of a billion dollars, and you look to what's cash on hand, it's just shy of a billion dollars.

If I put both packages together, I'm not going to realize if I shoot the moon, to use Your Honor's expression, on all of our potential claims. I'm not going to get ten cents on the dollar. Whereas the existing GUC Trust unit holders have already recovered 30 cents on the dollar. So on a theory of can a court of competent jurisdiction fashion a remedy, if I'm just left to the accordion feature, I get half the remedy I think I'm otherwise entitled to.

And as to your point that this is "old money," Your Honor, I would make the following points. When we did the equitable mootness statement of facts, Paragraph 11 of that statement of facts, that stipulation of facts, provided that late-filed proofs of claim may be subsequently adjudicated as allowed general unsecured claims.

The late claims order that Your Honor entered at Paragraph 2 provides that "Claimants with late claims can seek to have them adjudicated as timely filed." Your Honor's

opinion said the remedy for a due process violation is the filing of late claims, or the request to file late claims. And the judgment that Your Honor entered said we can in fact file late claims, but there's not pot to glom onto.

Now, under the plan, plaintiffs can become allowed late GUC claims and obtain a distribution. That's Section 1.79 of the plan. Any claim against any of the debtors as otherwise determined by the bankruptcy court to be a general unsecured claim.

Section 1.4 means that allowed means any claim expressly allowed by a final order pursuant to the claims settlement procedure or under the plan.

Section 1.75 says, "A final order means an order which has not been reversed, vacated or stayed."

There's no limitation on a late-filed claim becoming an allowed claim, and getting catch-up distributions. The same as in every other Chapter 11 plan of reorganization.

So, Your Honor, we believe it's wrong that expectations regarding late claims are impossible and shouldn't be allowed to eat into the remaining pot. In fact, on appeal it's our contention that the 30 cents that's already been distributed needs to be reallocated, and we need to get money back from the unit holders that have already received distributions. And it's wrong that granting us relief would anyhow violate the plan or the confirmation order.

Your Honor, again, I think it serves repeating that but for Your Honor's having already found that our clients were denied due process, we would have been in a position to file claims on a timely basis together with everyone else, and we would have lined up with all of the other GUC Trust beneficiaries and been entitled to a recovery. And we too would have shared in the 30 cents that's already gone out the door.

There ain't that much left to go out the door, and we think we're entitled to our fair share. And Your Honor, again, I understand the bonding issue and I understand the burden that we have, and I understand that this is against the weight of authority in terms of providing security. But we do have truly a unique set of facts.

You have no evidence that could possibly support a percentage above five percent, and every reason to believe that that percentage ought to be discounted. And think about it, Your Honor. You're asking a bunch of class action plaintiffs to find the money to post the bond. That's an extreme undertaking when you look at the other side of the coin with protecting hedge funds that made a voluntary investment, in my view knowing full well what the risks were of having their claims diluted by virtue of the fact that a whole bunch of people were denied due process.

THE COURT: Isn't making moral judgments on my part

on the relative entitlements to sharing pies in the Chapter 11 cases on my watch exactly antithetical to the practices we've had in managing large 11's with distressed investors over the last 15 years?

MR. WEISFELNER: Absolutely, Your Honor. And least I be accused of being Trump-like, I would submit, Your Honor, that you're not entitled to make moral distinctions. And I'm not asking you to make moral distinctions. I don't know that there is anything better or worse about a hedge fund investor versus a personal injury or economic loss plaintiffs, except to the following extent; and it's not a moral issue, it's a legal and factual distinction.

Unlike the folks that filed claims in a timely fashion, my clients were denied due process and the opportunity to get in line with everybody else. Unlike my clients, the opposition here are hedge funds, and we know how much we love hedge funds, and in particular how much I love hedge funds, but the fact of the matter is they bought and sold the underlying security with full knowledge of the potential for diminution of value and dilution in their ultimate recoveries.

And what I'm suggesting, Your Honor, is I can protect them, and I can protect them way better than they've asked me to protect them. Give them the money. But give them the money on condition that they give me an undertaking to return the money. And they can return the money at half the interest rate

than the five percent, which is the mean of all the indexes over time.

And Your Honor, the money is not scheduled, cannot physically go out the door until, quote, "mid-November." It's now the end of September.

Your Honor, I know Mr. Golden. I've worked with him for years. And I know the folks at Gibson Dunn and I've worked with them on numerous occasions. Give me a week and we can come up with an appropriate undertaking that will satisfy us and give them all their money, and give them all their money in November and you don't have to come back. We'll give them all their money next November.

If my appeals take that long, which it won't -- and by the way, when you look at what the appropriate time frames are, Your Honor, we've asked the Second Circuit, or will be asking the Second Circuit, to set a 90-day briefing schedule. Three months. Three months from today. Which means one month into the calculation of interest.

THE COURT: Is there anything in any document that I can look at to ascertain that, or is that simply your aspiration, in terms of implementing what Jesse Furman had directed you to do?

MR. WEISFELNER: Your Honor, I'm told that there's nothing I can show you. I can represent to you as an officer of the Court that there is a draft motion to expedite that's

circulating among all of the parties. That includes new GM. It includes the GUC Trust. It includes the GUC Trust unit holders. It includes the Grumman plaintiffs. It includes Gary Peller. And the bid, which I understand is unopposed by anybody, is 30/30/15/15 for briefs, which would take it to 90 days before the entire matter is fully briefed.

Your Honor, sitting here today, I can't tell you whether or not every single one of the parties that we had to represent to the Second Circuit was on board are in fact on board. It's my understanding that they are. But I can tell you the Second Circuit certainly hasn't ruled on that. And even if it is a 90-day briefing schedule, there's nothing that the parties could do, stand on their head and spit nickels, that cuffs the Second Circuit into how much time it takes to resolve those issues.

But I think the thing can be fully briefed in three months. And all I'm saying, Your Honor, is I think we can call the hedge fund's bluff on this. Give them the money. But make it easy enough for me, if I'm successful on the appeal, to claw the money back at a reasonable rate of return, which they wanted 16 percent as their protected rate. I'm saying give me back the money at two and a half percent, keep the balance for yourself as a gift.

For all of those reasons, Your Honor, I'd respectfully submit that the evidence demonstrates that the

most a bond could possibly be is as reflected in our illustrative example, there are numerous discounts that are appropriate. And I think our offer to the hedge fund sort of proves it up, that this is really an equitable search for what the right protected rate is. I think my offer obviates that, with all due respect. And for that reason, when the hedge funds reject my suggestion, there ought to be no bond. Thank you, Judge.

THE COURT: Okay. I'll hear from you, Ms. Rubin and Ms. Newman, or as you may choose to divide up the same amount of time.

MS. RUBIN: Thank you, Your Honor. There's a lot that Mr. Weisfelner said today to respond to, so I hope that Your Honor grants me a little bit of latitude in responding to that.

Let me start by saying, Your Honor, I'm mindful of your admonition at the beginning not to spend too much time on the stay factors, and I will try my very best, Your Honor, to adhere to that, but I do want to talk about two elements of the four horsemen very quickly, Your Honor, if I can, before turning to the bond, and that is starting with the irreparable harm factor.

Your Honor suggested, during his opening remarks the other day, there's plainly irreparable injury here where money goes out the door to many, many different people and it's

difficult, if not impossible, to get the money back. The problem is, Your Honor, on the law of this circuit, the plaintiffs have not shown irreparable harm. Your Honor knows, because I mentioned the other day and Your Honor stated his agreement with this general principle, that most courts in the Second Circuit have held that the risk that an appeal will be moot absent a stay without more does not constitute irreparable harm.

But even those courts that acknowledge that there could be irreparable harm from the mooting of appeal consider that mootness can satisfy the irreparable harm prong only where the denial of a stay risks mooting an appeal of significant of claims of error. And that's where I want to start, Your Honor, this morning. I want to talk about whether or not there is a significant claim of error here, which is an analysis that dovetails quite nicely with the likelihood-of-success-on-the-merits prong.

And indeed, Your Honor I'm sure is also mindful that, as in the BGI decision, there are a number of courts in this circuit that have held that there is an inverse proportionality, if you will, between the irreparable harm prong on one hand, and the likelihood of success of the merits on the other. Respectfully, Your Honor, I will submit to you today that the risk of irreparable harm to the clients Mr. Weisfelner represents is minimal and, accordingly, the burden

on him to demonstrate the likelihood of success on the merits is very high.

And let me start there, because I don't think Mr. Weisfelner is ever going to get there. Your Honor, in the Second Circuit, a finding of equitable mootness can be reversed only on an abuse-of-discretion standard that comes from the BGI case, that's 772 F.3d 102, and the pin cite there is 107. That's the Second Circuit's decision in 2014 in BGI.

THE COURT: What was the jump cite, Ms. Rubin?

MS. RUBIN: 107, Your Honor.

THE COURT: Okay.

MS. RUBIN: Your Honor is also mindful that under Second Circuit precedent -- this is the Chateaugay decision, and I'm again quoting from BGI decision:

"Only if all five Chateaugay factors are met, and if the appellant prevails on the merits of its legal claims, can relief be granted."

That's to overcome the presumption of equitable mootness on the first place.

So in order for Mr. Weisfelner to succeed on appeal, he has to convince the Second Circuit that Your Honor abused his discretion in determining that three of the five Chateaugay factors went against the plaintiff. And that is the import of Your Honor's ruling in the threshold issues decision. It was not a close call, as Mr. Weisfelner said here today and as he

says in his brief.

The five Chateaugay factors include that the Court can still order some effective relief; that that relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Court. And, third, that the appellants pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Each of those three factors were ones that Your Honor squarely held in his April 15th, 2015 decision went against the plaintiffs.

So let's talk about each of those factors, because the one I'm most interested in, Your Honor, is the last one. Did the plaintiffs pursue with diligence all available remedies to obtain a stay? And the answer is no. In fact, as Your Honor put it in the decision, Mr. Weisfelner made a tactical choice, and I'm quoting from Your Honor's decision, "to pursue claims against New GM first and resort to the GUC Trust only if necessary." That's 529 B.R. The jump cite is 591. That's Your Honor's April 15th, 2015 decision.

And the Court saw this -- Your Honor saw this as analogous to the plaintiff's lack of diligence in the BGI

proceeding and how that plaintiff's -- and again I'm quoting -- "failure to diligently pursue claims against the GUC Trust prevents them from doing so now."

Your Honor, Mr. Weisfelner is going to have to convince the court of appeals that it was an abuse of Your Honor's discretion to make that decision, and I'm not sure how he's going to do that.

Mr. Weisfelner, the other day, also focused on the first Chateaugay factor, arguing that his claim should prevail because the Court can still order some effective relief for his clients that won't disturb the unitholders' expectations. This is a fiction, Your Honor. First of all, the Court did consider the accordion feature. That's true at 529 B.R. 538, that's where you considered the accordion feature in Your Honor's decision. Again, in the decision on form of judgment, that's Docket Number 13162 at Pages 9 and 10 where the Court explains that the unitholders knew that there was an accordion feature, but then also knew that claims exposure would result with exceptions exceedingly difficult to show only from previously-filed claims.

But the most important factor is that the accordion feature has not been triggered, so let's talk about the reality of where we stand now, which is discussed in our stipulated facts. As it stands now, Your Honor, the allowed claims tally is about 31.8 billion in allowed claims. To even trigger the

accordion feature, we're going to have to get to a point where the Trust has $35 billion in allowed general unsecured claims. We don't even trigger the first share of New GM common stock available through the accordion feature until that allowed general unsecured claims pool reaches over $35 billion.

So any ruling that this Court could fashion effective relief based on the accordion feature would be pure conjecture. Why is that? Because Mr. Weisfelner has never filed a claim; not an individual claim, not a contingent claim, and certainly not a putative class group claim. And Your Honor, Mr. Weisfelner told you today that I have some chutzpah raising this; that Ms. Newman and I are both really on thin ice in raising this. But, Your Honor, I've spent a bunch of time with the same order that Mr. Weisfelner raised before you and I'd like to hand a copy up to the Court as well. May I?

THE COURT: Sure. Which order we talking about though?

MS. RUBIN: We're talking about -- and I don't think the microphone is picking me up right now, Your Honor.

THE COURT: Well, the microphone's picking me up. This is the scheduling order of May 16th, 2014, ECF 12697.

MS. RUBIN: So let's start on the front page, Your Honor, because I was involved in negotiation of this order, as was Ms. Newman and Mr. Golden and others at the Gibson Dunn firm.

When this order was negotiated, Mr. Weisfelner, on behalf of seven individual plaintiffs who he represented in an objection filed on April 24th, 2014, there was no MDL proceeding at that time, there was no federal class action, to the best of my knowledge. Certainly Judge Furman was not involved at that time. On the first page it says that upon the court's order scheduling a conference for a particular date to address procedural issues respecting the motion seeking to enforce the sale order injunction, that's referring to the motion by New GM, the objection dated April 22nd, 2014 to the motion filed by certain plaintiffs, referencing Docket Number 12629, that's the objection filed by Mr. Weisfelner.

For the rest of this order, there's a reference to Plaintiffs that is never defined, but it refers to the clients represented then by Mr. Weisfelner, seven individuals who had between them five putative class actions in which they sought to represent individuals affected by the ignition switch defect and owners of certain cars that, to this date, have not been recalled, and then it refers to the Grumman plaintiffs, which refers represented by Mr. Boxer, who is in the courtroom today.

Now, the paragraph that Mr. Weisfelner is referring to appears on Page 3. It says:

"Ordered that the GUC Trust agrees that it shall not assert a timeliness objection to any claims that the Plaintiffs may attempt to assert against the Old GM

bankruptcy estate and/or the GUC Trust, based directly or indirectly on the ignition switch issue, as a result of the Plaintiffs' delay in asserting such claims during the 'interval.'"

Let me pause there, Your Honor, to explain the import of this, at least as far as I understand it.

There has never been an amendment of this order to expand the import of this paragraph for any plaintiffs other than those defined in this order. Never at the time of this order did Mr. Weisfelner, or anyone else for that matter, represent clients who putatively had non-ignition-switch-related claims. Nor did they represent people who were involved in pre-closing accidents.

To the extent that I have any chutzpah at all, it's because I stand up here and are trying to, in violation of this order, according to Mr. Weisfelner, draw some conclusions about it. But the import of this order is not nearly as broad as he would have it. Nobody has ever sought to amend this order.

Now, he also says that I agree not to assert a timeliness objection, but, Your Honor, whether or not Mr. Weisfelner can establish irreparable harm is entirely separate and apart from whether he can assert -- whether I can assert a timeliness objection. And I'll submit to Your Honor that, again, from the BGI case and others, the plaintiffs have to show that there would be an actual and imminent injury to them

to establish irreparable harm under the law of this circuit. BGI case tells us where a party who seeks a stay pending appeal has not acted with diligence throughout the course of that appeal, that party cannot establish irreparable harm.

So whether or not this says what Mr. Weisfelner says it does, even for some group of plaintiffs, I'm not sure that it has any effect on what it is that we're talking about here today. It's not a timeliness objection that we're talking about, it's whether or not they've been injured at all.

Your Honor, I want to return now to the topic of the bond and some of the things that Mr. Weisfelner said in terms of presenting Your Honor with his demonstrative, and then talk about why Mr. Scruton's calculations, and really the only expert supported calculations that Your Honor has before him, are the ones that make sense here.

Let's take a look, Your Honor, first at what the law is in this circuit about the point of the bond, because Mr. Weisfelner likes to make a lot out of the difference between likely and predictive on one hand, and what Mr. Scruton said he was doing, which was to try and calculate a protective rate of return that would result in an appropriate bond.

Again, Your Honor, the law in this circuit is that where a stay pending appeal should be granted, the court should set the bond -- I'm quoting from Judge Scheindlin's opinion in the Adelphia matter at 361 B.R., the pin cite is at Page 368:

"The court should set the bond at or near the full amount of the potential harm to the non-moving parties. The appellants must post a substantial bond that is commensurate with the threatened loss to the non-moving parties. Not the most likely return to them. Not the one you can predict on the basis of recent market activity. It is the full amount of the potential harm to the non-moving parties."

And then she goes on to continue:

"In distinguishing the amount of that bond from what the harm might be to the non-moving party, the purpose of the supersedeas bond is not to act as liquidity damages to the appellees; rather, if the appellants ultimately lost the appeal, in order for the appellees to recover any portion of the bond, they will be required to prove up the amount of damages."

In other words, Judge Scheindlin is, of course, understanding and recognizing that the amount that the moving party should post for the bond is inherently distinct from the amount that might be suffered from them as damages. The notion that the bond should be set at or near the full amount of the potential harm has been repeated by multiple courts in this circuit, including the last couple of years. Let me just cite a couple of them to you. That standard was recited by Judge

Glenn in In re Grubb & Ellis Company. That's 212 Westlaw 1036071. The pin cite is at 11. That's an opinion of the bankruptcy court of this district on March 27th, 2012.

And again, Your Honor, in the Cantour (phonetic) case, while Your Honor did not cite that exact language, Your Honor talked, in calculating what the appropriate bond might be, Your Honor ultimately did not require the parties to post the bond because you found that the parties who wanted the stay weren't prepared to post any bond. But Your Honor calculated what bond would be required based on the need for "protection for a 40-percent stock drop," and then you -- then considered that with respect to the amounts due to be distributed, that you'd have to think about the lost opportunity cost to the stockholders there. And you then used eight percent as the appropriate rate to get to a rate of $1.6 million per year on those components of the distribution. You also noted that it was very possibly considerably higher, given the length of the appeal here at issue.

THE COURT: What are we talking about, my ruling on Contour?

MS. RUBIN: Yes, we are, Your Honor.

Now, I also note that during the evidentiary portion of the hearing, Mr. Weisfelner asked Mr. Scruton some questions about how Mr. Kurtz calculated the bond, but if you look at the entirety of his declaration, again and again and again he talks

about the fact that the task before him is to calculate a bond that would fully protect the non-moving parties in the event that the stay pending appeal were granted.

So now let's talk about, Your Honor, if we can, why the calculations Mr. Weisfelner has put before you are not a reasonable or even borderline acceptable alternative for the declaration that Mr. Scruton gave and the hours of testimony that he supported as well. Not only is it not supported by an expert, not only was there no affirmative evidentiary showing by Mr. Weisfelner during the evidentiary portion of the hearing, but there are a lot of assumptions in this demonstrative that are just flat out wrong based on concessions that even Mr. Weisfelner had made, the first of which is probably the most important.

Your Honor, the plaintiff's name in the column of Mr. Weisfelner's demonstrative and the Scruton supplemental declaration mean are both averages that assume an equal weighting of the population among asset classes. In other words, 25 percent of investors in the S&P, 25 percent of investors in the High Grade Master Index by B of A and Merrill Lynch, 25 percent of the hedge fund index, and another 25 percent in a 10-year Treasury yield curve.

Mr. Weisfelner stood up here before you though earlier this afternoon and said, neither side contests that the majority of the units here are held by hedge funds. In fact,

Mr. Scruton testified that while he was asked to assume, based on a representation by the participating unitholders, that 47 percent of the units were held by hedge funds, that in his experience in the restructuring and reorganization sector, it was likely more true, in his estimation, that 80-plus percent of the units were owned by those people. That was one of the bases, Your Honor, on which Mr. Scruton told you repeatedly, and in his declaration, that his assumptions were, in fact, conservative, not aggressive.

Let's return to --

THE COURT: Pause, please. A couple of questions there.

I take it everybody agrees that I don't have any actual eminence of who, besides the 47 percent in the Akin Gump group, are hedge funds. And I take it you agree with that as well?

MS. RUBIN: I do, Your Honor.

THE COURT: I have a hole in the proof on -- and sometimes with burdens we have ways of dealing with the hole in the proof, but I don't know, other than Scruton's affidavit, anything about the others. And although Scruton has the expertise to give me a view on how you compute opportunity cost, the classic thing for which expert testimony is offered, he hasn't been qualified as an expert on who buys units in reorganized debtors, has he?

MS. RUBIN: Your Honor, Mr. Scruton offered that opinion based on his series -- I'm sorry, based on his years of experience in this. That testimony, as far as I know, was not challenged by Mr. Weisfelner, it appears in his declaration.

To the extent that you've got a failure of proof here, Your Honor, I would submit that the failure of proof lies particular on the plaintiffs' side. The plaintiffs put forward before Your Honor a demonstrative that's based on an equal distribution of asset classes in the unitholder population when even Mr. Weisfelner says that that assumption is untrue by almost double.

In other words, Mr. Weisfelner has put forward calculations before Your Honor on the assumption that 25 percent of the units are owned by hedge fund investors. We all know, Your Honor, because Mr. Scruton was asked to assume, because Ms. Newman made a representation to Mr. Weisfelner in lieu of further discovery, that 47 percent, approximately, of those units are held by the participating unitholders. That's to say nothing of other hedge fund investors, those are just the hedge funds represented by Mr. Golden.

So you're right to say, Your Honor, we don't have any other information and certainly I, as counsel for the GUC Trust, don't have that information. But what we do have is an expert, whose qualifications weren't questioned on that front, telling me that on the basis of his 20-plus years of experience

working in the reorganization and restructuring sector, during which he has held many assignments on behalf of hedge funds, he was asked that question by Mr. Weisfelner at his deposition, he answered it affirmatively and said he's worked for him many times, that his supposition, based on his understanding of a security of this nature, is that 80-plus percent of them are owned by hedge funds.

THE COURT: Uh-huh. Well, I have a little experience too, but I wasn't sworn as a witness or as an expert. Do you think it's right or wrong for me to use my experience in the matter of that current? I may have been in a bunch of bankruptcy cases longer than Mr. Scruton has, but I haven't been sworn as a witness.

MS. RUBIN: I believe that Your Honor is empowered to consider evidentiary holes as Your Honor sees fit. Certainly in the Cantour case, where Your Honor was not presented with evidence by either side as to how to come to the appropriate calculation of the bond, Your Honor relied on market evidence available to him and came up with what he believed was a reasonable way to get there.

THE COURT: One thing that's bugging me, Ms. Rubin. I don't know which way it cuts, but it bugs me, whoever gets gored by this, I had believed that at the outset of this case there were a lot of creditors of Old GM who weren't in hedge funds. I think it's likely, because I've been doing this for a

while, that mom-and-pop creditors, bondholders, possibly tort litigants sold their claims and they wound up in the hands of hedge funds. It's a lot harder for me to go from the fact that I guess some of them to any given number have, and I don't know when they did it, whether they did it before or after the plan.

Assuming they didn't, how is a guy like me supposed to deal with that possibility when he doesn't have anything more certain to work off?

MS. RUBIN: Your Honor, I wish that I could supply you with more. I believe that I've presented Your Honor with argument before about why the GUC Trust isn't permitted to present you with more.

What I would say on instance, Your Honor, is that what Your Honor has to rely upon that's in evidence is Mr. Scruton's expert testimony. It hasn't been challenged by the party moving for the stay. Mr. Weisfelner stood up before you several moments ago and said that he thought that -- I want to make sure that I'm quoting him accurately:

"Neither side contests that a majority of the units are held by hedge funds here."

That's an important concession, Your Honor, and one that, most importantly, to return to my first point, makes everything that he's presented to you in this demonstrative inherently unreliable.

But, Your Honor, if I can continue about the

unreliability of the demonstrative presented to you by Mr. Weisfelner, there are other reasons why this shouldn't be credited. In addition to the equal weighting problem, which is probably its biggest defect, Mr. Weisfelner's calculations are also based on a simple mean. Now you heard testimony from Mr. Scruton the other day about why the simple mean is not appropriately protected, because he told you in those circumstances 50 percent of the time you're going to be wrong, you're going to post a bond that is insufficiently protective for the circumstances.

The methodology that he used, conversely, the third best, he acknowledged was not one that he's used in the past to calculate lost opportunity costs, but he also acknowledged the uniqueness of this particular fact circumstances and that he wanted to calculate, as he put it in his declaration, a conservative estimate of the maximum potential harm. He took comfort, Your Honor, in the statistical principle that the third highest return for each asset class was within one standard deviation.

The simple mean, according to Mr. Scruton's expert testimony, was insufficiently protective. In fact, on one occasion he was asked, which was more predictive of returns, the simple mean or the trimmed mean. And Mr. Scruton's testimony and -- Your Honor, you'll forgive me, I'm looking for the pages right now where he says this -- is that neither one

was predictive, that neither one --

THE COURT: Neither one was predictive or protective.

MS. RUBIN: Neither one was a very good predictor. I'll quote to you, Your Honor, from Page 163 of the transcript from Tuesday's hearing.

THE COURT: 163?

MS. RUBIN: 163 at Line 19 said: "I think neither are very good predictors. So it's a choice between two very unpredictive approaches in terms of trying to -- we are trying to achieve the most likely. They're two data points that I wouldn't use in trying to -- if I was asked to assess what the most likely return would be."

And then Mr. Scruton, a couple of pages later said: "I'm not trying to use the most likely, I'm trying to use a measure that represents the returns that are probably -- they represent a potential return to investors. And the measure I've chosen" --

I'm sorry, Your Honor, let me go to Page -- I'm sorry, the same page, 165 at Line 8.

THE COURT: 165?

MS. RUBIN: At Line 8, and after commenting that the measure that he's chosen is within one standard deviation from the mean, in fact, "is the mean upon the standard deviation from the mean," and he's talking about the Credit Suisse index, Your Honor, here.

"What that's telling me is that I've taken a very conservative estimate of the range of outcomes, because if you look once at a deviation from the mean of a range of outcomes going forward, you capture essentially that 80 percent number that I've mentioned. And so I've taken a conservative estimate of the range of what might happen as an estimate of the rates used when calculating the protective rate of return."

Now Your Honor, let me return now to Mr. Weisfelner's exhibit. The third problem with it is that it's a simple multiplication, there's no compounding here, which Mr. Scruton has further testified is not the appropriate way of calculating a likely or potential rate of return.

And the fourth problem with it --

THE COURT: Pause, please, Ms. Rubin. Let's stick with that for a second --

MS. RUBIN: Yes.

THE COURT: -- because during the break you were reviewing, and I noticed that, too. If I recall correctly, Mr. Scruton said that without doing it by a calculator or computer, the compounded rate would be about 10 percent higher, if I recall his testimony. I think it was in response to my questioning toward the end.

MS. RUBIN: That's correct, Your Honor. But of course that's --

THE COURT: Yeah, but time out for a second.

MS. RUBIN: Sure.

THE COURT: Do you -- is it mathematically possible, as a mater of compounding arithmetic, to take what he perceives to be the appropriate bond and to adjust for the compounding by adding 10 percent or multiplying it by 1.10 percent, or do you need to do it separately for each of the present investments at .12 percent and then the alternative deemed investment at whatever percent I determine is the appropriate yield?

MS. RUBIN: Your Honor, if I understand your question correctly, and I'm not sure that I do, I'm not sure that that, in fact, would be appropriate. Part of the reason that that would be inappropriate is that the calculations presented to you by Mr. Weisfelner are suffused with other errors and therefore trying to up them by 10 percent wouldn't correct for the compounding error, given that they incorporate other faulty assumptions with which we take serious and significant issue.

Did I respond to Your Honor's question or did I misunderstand it?

THE COURT: I understand the bottom line, but I don't know, from what you just told me, the process. I mean I drew, from what you just said, that I can't use Mr. Weisfelner's, what was it, 5.03 percent and that I -- in your view I need to use a number that's materially higher.

MS. RUBIN: I believe that's true, Your Honor, because baked into Mr. Weisfelner's calculation of the 5.03 is

the supposition that each of the four asset classes are equally distributed throughout --

THE COURT: I understood that. But based upon your arguments and Mr. Weisfelner's responses were all done, I might come up with a number that's, say, higher than 5.03 percent, that's still lower than yours.

MS. RUBIN: I understand, Your Honor.

THE COURT: Then I have what I'll call the multiplication issue. Are you telling me that you think that once I get my deemed interest rate, which might be 5.03 or it might be higher, I'm still making a material error by simply not adding 10 percent to that?

MS. RUBIN: It's my understanding, Your Honor, that the correct way to compound would be to take each component rate of return, from the separate indices, and multiply those by the 10 percent before coming to the composite rate.

THE COURT: Okay.

MS. RUBIN: Okay.

THE COURT: I mean I was trained to do that in college. It's a burdensome exercise for a judge to do.

MS. RUBIN: I understand.

THE COURT: And most people don't like judges to go off on their own kind of independent inquiries to do that kind of stuff. But I understand what you're saying as a matter of discount arithmetic.

MS. RUBIN: I understand. Your Honor, for your ease, I would refer Your Honor, in the event that Your Honor would like to look at various sensitivities, I would encourage Your Honor to look at Exhibits D-1 and F-1.

THE COURT: Yeah, that's what your witness did. But the problem is, Ms. Rubin, that I may not agree with you anymore than I agree with Mr. Weisfelner.

MS. RUBIN: That may be true, Your Honor, but at least in terms of scenario two in Mr. Scruton's -- both his original declaration and in his supplemental exhibits, for example, starts with the supposition of a population of unitholders that is distributed with 47 percent in hedge funds and the remaining asset classes evenly divided. It then takes those to come up with rates of return, based on the third highest return for each index, which is Mr. Scruton's preferred method, as you know, but also offers rates of return based on the trimmed mean and the mean, as well as an adjusted weighted average protection rate of return that adds in the two percent in management fees that hedge funds are -- which he testified he believed was appropriate.

Your Honor, if I can return to the calculation of the bond and what we believe is appropriate. Your Honor, the bottom line, in terms of what we believe is appropriate, is reflected in Footnote 1 of Exhibit D-1, that's Mr. Scruton's supplemental exhibits. Mr. Scruton testified that if one were

to calculate the bond, based on a ten-month lost opportunity cost, that assumes the stay, for example, would begin tomorrow, but the lost opportunity calculation would not begin until mid-November, when the distribution is scheduled to be made, he arrives at a number of 15.2 million.

And then he told Your Honor, on his testimony, that he believed it would be appropriate to adjust that amount to reflect the two percent and incentive and management fees that hedge funds earn that are not incorporated in the Credit Suisse index. It's our position, Your Honor, that the appropriate amount of the bond here is 16.3 million, as reflected in Footnote 1 to Page 1 of Exhibit D-1.

And let me talk about some of Mr. Weisfelner's other criticisms before I return to Mr. Scruton's methodology. Mr. Weisfelner is very keen to say that nobody has used Mr. Scruton's methodology before. Your Honor is mindful, I'm sure, of the fact that there isn't a whole lot of case law out there on any methodology for the calculation of lost opportunity costs, let alone --

THE COURT: Well, there's tons of it, Ms. Rubin. It may not come up in the context of bonds. I tried cases like that as a civil litigator back in the '90s. I had an insurer that was stiffed on a loan and I put on an expert to talk about what teacher's insurance could get on its alternative loan after the borrower had (indiscernible).

MS. RUBIN: And, Your Honor --

THE COURT: And, you know, there was cross-examination of the expert on whether you had to use a ten-year treasury or whether you would use a ten-year double-A because that was the credit rating of the alternate investment. That stuff gets done all the time. And under Erie County, you know, those kinds of damages computations are done both in state and federal court all the time.

MS. RUBIN: I understand, Your Honor. And what I meant to refer to is the lost opportunity costs associated with a distribution of cash in a situation such as this, where putting aside the calculation of damages, you're trying to come up with the -- what a conservative estimate is of a full protection needed for the protection of the non-moving party.

Your Honor, my point was that in the same way that this is maybe uncharted territory for Mr. Scruton, I don't see Mr. Weisfelner saying to you that there was a lot of precedent for this either. And part of that is both sides, I believe, are a little bit in uncharted territory, at least where the specific facts of this case are concerned.

Let me talk now, Your Honor, about the issue of permitted investments, because Mr. Weisfelner is motivated to, and he has talked extensively about, trying to narrow the delta between the lost opportunity costs to the unitholders on one hand and the rate of return that he believes it would be

appropriate for the GUC Trust to earn.

He said that there was no evidence that the GUC Trust couldn't invest in a variety of other investments that are classified as permitted investments under the plan. And, Your Honor, that's simply not true. So let me start with our stipulations of fact, Your Honor, at Paragraph 21.

Why Mr. Weisfelner continues and perseverates on this point is a little bit baffling to me when he stipulated to the follow representation, quote:

"That subsequent to stock sale, in order to avoid any argument that the trust is an investment company, the GUC Trust has invested all of the GUC Trust cash in a mix of short-term U.S. Treasury securities."

Now, Your Honor, in the preamble to these stipulated facts, and I invite Your Honor to take a look at them, on Page 2 of these stipulated facts it says as follows, middle of the page:

"The stipulation of facts are agreed by the parties and are provided in lieu of and in full satisfaction of any deposition testimony or document production requests with respect to deposition topics," and then it enumerates them.

Topic four is one of them. Your Honor will notice that topic four, as reflected in Exhibit 1 to the stipulated facts is the following: Capital P, "Permissible," Capital I

"Investments," and rates of return. Mr. Weisfelner never asked whether or not the stipulation had any basis. He didn't ask for any evidence. He accepted that stipulation in full satisfaction of the deposition testimony, so for him to make an issue of it here now is a little bit rich.

But let me put Your Honor's mind to rest about permissible investments and the Investment Company Act concern, if I can. The GUC Trust did, in fact, seek the no-action letter that Mr. Weisfelner has talked about. We were told by the SEC that no no-action letter would be forthcoming, that the facts that -- with which we presented to SEC were not sufficiently novel to merit a new no-action letter, and therefore, if the GUC Trust wanted to do more than invest in securities from the U.S. Treasury, the GUC Trust was going to have to take that risk for itself.

And, Your Honor, you know as well as I do that the GUC Trust is a fiduciary. To expose ourselves to Securities Act claims in order to make a minimal return for what we fully expect will be a short period of time, pending our ability to make the November 15 distribution, was not worth it. It was not worth that risk. And so the GUC Trust determined that the appropriate thing to do was between July and August, when the stock sale occurred, and November 15, when it anticipates fully making that distribution, was to invest in a mix of short-term securities. We don't believe that there should be any further

controversy about this or any inference drawn that the GUC Trust is not acting fully in its fiduciary capacity there.

Now, Mr. Weisfelner has also suggested that our conversion of the stock to cash was somehow improper, and let me address that. Your Honor, we moved for --

THE COURT: I don't want you to do that for two reasons, Ms. Rubin. One, because I don't see it as a big enough issue. And secondly, I think you're very close to the end of your time, if you're not over it.

MS. RUBIN: Thank you, Your Honor. Let me try and sum up as quickly as I can. The calculations made by Mr. Scruton are reasonable ones, Your Honor. They're reasonable on a whole host of measures, and they are conservative, Your Honor.

The stay period is conservative for the following reasons: Mr. Weisfelner told you that there was a proposal that he believes no one has objected to for a three-month briefing schedule. That proposal was made on the evening of September 21st, the evening before this hearing. It has been objected to by New GM. I expect that it will be objected to by others, were it not for the Jewish holiday and for the time consumed in preparing for this hearing.

Even if that three-month briefing schedule were accepted, Your Honor, however, that would assume for a four-month to six-month stay that we could get through oral argument

and a decision in the Second Circuit in a period of one to three months. Your Honor, I don't believe that's realistic and I'll tell you why.

Earlier this week the parties to the appeal of the threshold issues decision and judgment filed their Form C with the Court of Appeals. Seven different groups filed Form C. I brought with me today, Your Honor, the Form C filed by the ignition switch plaintiffs, the ignition switch pre-closing accident plaintiffs, the GUC Trust and New GM so that Your Honor could see the constellation of issues that have emerged from Your Honor's decision on the four threshold issues.

Because let me assure Your Honor, this is no simple binary appeal with one winner and one loser. There are a variety of issues that the parties attack in a bunch of different ways. There are mixed questions of law and fact. A 12-month stay here is conservative.

The other reason that a 12-month stay here is conservative is I understand, and although the GUC Trust is not a party to this, that Mr. Weisfelner's clients and New GM are in the process of briefing before Your Honor two important issues. One is the permissibility of punitive damages. The second is the question of imputation. It has been suggested to me that Your Honor's decisions on those issues may be presented to the circuit, with the suggestion from one of the affected parties that the appeals should just be conjoined. And if that

happens, Your Honor, 12 months would certainly be a conservative period of time. Twelve months, we believe, is the right period.

The population distribution and Mr. Scruton's calculations are conservative. Mr. Scruton testified that the hedge fund's cost bases for future investments were also baked into the return rate reflected by the Credit Suisse event-driven multi-strategy hedge fund. He said that at Page 166 and 167 of his testimony. And as Your Honor knows, from my earlier statements, he testified that he felt the real distribution in the population was closer to 80 plus percent.

And most importantly, the rate of return calculation that he made was conservative. Nobody on the plaintiff's side, Your Honor, is quibbling with the indices that we chose. What they're saying is there's something wrong with Mr. Scruton's choice of the third highest for each index across ten years of annual index returns. But the point of the bond, Your Honor, is protection. This is meant to be insurance. I've never met a homeowner, Your Honor, who buys insurance to only cover half the value of his home. Similarly here, the point of the bond is to offer protection to those in the unitholder's situation.

Your Honor, there's been lots of discussion about David Kurtz's declaration and the Tribune matter, and his use of the yield-to-worst of the Bank of America Merrill Lynch U.S. High Yield Master II index. But even Judge Carey referred to

the use of that index, in his opinion, as conservative. That's the Tribune decision at 477 B.R. 465 at 481 (2012).

Your Honor, finally what I would say is Mr. Weisfelner has put a lot of emphasis on recent data and what recent market performance shows, and again I would submit to Your Honor that you shouldn't be tempted by recent data. Mr. Scruton testified that the use of very recent short-term indices don't approach the statistical significance in terms of an amount of robust data. He further testified that there is volatility in the markets, as Your Honor well knows.

I would draw your attention to Exhibit C-1 of the revised calculations which show that in every year with negative returns, there is a substantial rebound and a positive return that corresponds to it. That would suggest to me, and hopefully to Your Honor, as well, that to draw too much from recent performance of the market would be a mistake here.

And to that point, Your Honor, I'll just draw your attention to, for example, in the hedge fund index, looking at Exhibit C-1 to Mr. Scruton's supplemental exhibits, the rate of return in 2011 of negative 11.96 percent is followed in the immediate next year by a positive return of 10.14 percent. The return to the S&P in 2011 of 2.11 percent, still positive, is followed the following year by an annualized return of 15.99 percent.

The reason Mr. Scruton used ten years' worth of data

here is because he understands that there is inherent volatility of the markets and that drawing conclusions from what has happened in the very recent past, as Mr. Weisfelner might do, is inappropriate here.

Your Honor, with that, I want to make one more comment, and that's about the accordion feature. Your Honor, if all this was about was the accordion feature, we wouldn't need to be here. There wouldn't need to be any stay of the distribution. Mr. Weisfelner would not have come to court in June and sought to enjoin future distributions based on our motion to liquidate. It's because he has a view that his clients need to enjoin this distribution to get at current GUC Trust assets.

And to his proposal that we should let the money go out and then we'll just repay him, respectfully, Your Honor, that's not a real proposal. Not only does it not comport with any law that I've seen, but it ignores the fact that the prevailing parties and the threshold issues decision, at least insofar as the current GUC Trust assets and the future GUC trust assets are concerned, are the unitholders and GUC Trust.

As a prevailing party, we are entitled to make the required distribution under the plan and the GUC Trust agreement, and we're entitled to be fairly compensated for the full quantum of the potential harm done to the unitholders. And with that, Your Honor, I'll rest, and thank you for your

indulgence.

THE COURT: All right. Thank you.

Mr. Weisfelner, you've got ten minutes to reply.

MR. WEISFELNER: Sure. Your Honor, I want to take some of what I think were some unfortunate misrepresentations. First of all, with regard to holes in the proof, Your Honor, Page 156 of the trial transcript, my question:

"Q But you told us at your deposition, didn't you, that you didn't have any information regarding the other 53 percent, and you don't believe that that information is knowable, and therefore you were required to make an assumption. Isn't that true?

"A That's true.

"Q In fact, when you were asked at your deposition whether sitting there on Friday what percentage of the GUC Trust units, the missing 53 percent, were held by non-event driven hedge funds, you told us you have no way to answer that question. Isn't that true?

"A I don't believe I have a way to answer that question, correct. That's true.

"Q And the estimate you just gave the Court is just based on your years of experience as opposed to any specific knowledge. Isn't that right?

"A Yeah. I believe, and I was careful in qualifying my basis, yes."

So, Your Honor, with all due respect, you do have a hole in the proof.

As to another misrepresentation, Your Honor, Page 101 of the trial transcript.

THE COURT: Was the 156 you were just making reference to from the deposition transcript?

MR. WEISFELNER: No, from the trial.

THE COURT: Oh, from the trial transcript of you repeating to him in the trial what had been said at deposition?

MR. WEISFELNER: It's the trial transcript, both what I repeated to him that was in the deposition and then I asked him, having no reference to the deposition.

THE COURT: Okay.

MR. WEISFELNER: That's 156 to 157.

THE COURT: And the second page reference you made just as I was interrupting you was what?

MR. WEISFELNER: Oh, I was about to refer Your Honor or invite Your Honor's attention rather to Page 100.

THE COURT: Also of the trial transcript of two days ago?

MR. WEISFELNER: Of the trial transcript. That's right. I'm sorry.

THE COURT: Okay.

MR. WEISFELNER: And this goes to the question or the issue that Ms. Rubin represented to you that if you looked at

Exhibit B-1 -- B as in boy one -- that you aren't to assume that the box that Mr. Scruton drew around 15.2 meant that that was his opinion. What she told you was that his true opinion is in Footnote Number 1, and that the right number is 16.3. Well, that's directly refuted by Mr. Scruton's testimony at Page 100:

"Q Because when you reflect the numbers, net of the fee, you're trying your best to demonstrate what the actual return to the underlying investor would be, correct?"

Actually, go back a question and answer:

"Q And when you did your calculations, you -- when you look at the information that's reflected in your charts, we're looking at the return to the hedge fund before deduction for any management fee, correct?

"A When I did -- in my charts the numbers reflect the returns net of those fees. I did not gross them up in the calculations of my return rates. That's the point of conservatism I made."

In terms of 101, he goes on to say:

"A I think I would have had a basis, given the investors here are hedge funds, to gross up the index for the two percent, but because that included an element of judgment that could be criticized as being aggressive, I determined it would be conservative not to gross up."

That's the testimony, and you heard her represent it that the right number is use the less conservative number and

go ahead and gross it up even though the witness told you that's not what he did.

Your Honor, now I'm going to talk about the stipulation because Ms. Rubin told you that the stipulation doesn't govern because I only represented seven plaintiffs. Well, Your Honor, read the definitions. I represented seven purported class representatives. The Grumman plaintiffs represented purported class representatives. There's no difference between the plaintiffs that she stipulated she wouldn't argue about the timing of our proofs of claim then as compared to the deposition of plaintiffs today, and any suggestion to the contrary is ludicrous.

Your Honor, next point. Ms. Rubin told you that there is no -- or she told you there was scant authority for the proposition or the methodology for determining lost opportunity costs, and therein lays the conundrum that we have. What we presented through cross-examination of the witness was standard lost opportunity cost, calculations, and methodologies that we've experienced for years, in my case 30 years, in Your Honor's case I'm sure a longer period of time.

The problem we have is that Mr. Scruton wasn't asked to calculate lost opportunity costs no matter what his demonstrative says by way of title. By his own testimony, Mr. Scruton was asked to testify to and calculate protective rates, whatever that means. What Mr. Scruton told you in no

uncertain terms as part of his testimony was if you focus on the mean, he rejects that as being the right calculation of protective rate of return because the mean is likely to be predictive of lost opportunity costs 50 percent of the time.

Half the time using the mean will give you too high of a bond, if the bond is supposed to represent lost opportunity costs. Fifty percent of the time the bond will give you too low of a protection. That's what a mean is defined as. It's the average of either being too high of a protection or too low of a protection if what you're looking to protect is lost opportunity costs. That's not what Scruton was asked to calculate. That's why we have stick my finger up in the air and come up with third highest rate of return that no one's heard of before.

THE COURT: Well, I think the comments you just made very satisfactorily describes the philosophical distinction between an alternative return that's wrong 50 percent and right 50 percent, by definition exactly what you said, and that which is higher than that to give new unitholders protection higher than with a 50 percent probability of being wrong.

So I don't think there's -- even if your guise is hiding the ball in terms of what you're asking me to find. But can you help me understand your position as to why a so-called protective rate of return that gets the likelihood of getting right up to the 80 percent range as contrasted to what

Ms. Rubin would say, glass half empty rather than half full, a 50 percent chance of being wrong isn't -- is better from your perspective and satisfactory to her side on the other?

MR. WEISFELNER: Certainly. Certainly, Your Honor. Look, I think the distinction is the cases that the unitholders and the trust relied on throughout their brief and throughout their oral argument are stays of confirmation orders and situations where people were being asked to stay confirmation pending appeal out of concern that the equitable mootness would be equitable mootness as it relates to a plan.

And, Your Honor, in the context of potentially, quote, "knocking the props out" from under a plan and taking a look at the multitude of transactions that occur in the context of consummation of a plan, we're talking about all sorts of stuff, as was true, for example, in Tribune in the Kurtz affidavit. We focused on one section. Kurtz then went on to talk about the potential harm associated with making distributions of stock to shareholders. Mr. Kurtz then went on to talk about the difficulty associated with free cash flow and free cash flow sweeps that would openly go out the door or for the benefit of shareholders.

Mr. Kurtz talked about opportunities in the business itself for being able to use free cash flow as part of reforming and resuscitating the business. Mr. Kurtz talked about the impact on competition in the industry where Tribune's

restructuring was to be held in place and forced to tread water while other competitors in the market advanced on Tribune.

That's not this case. This plan was confirmed. This plan was consummated. People got their distributions. The government owned most of the equity. The government sold out of its equity. The unitholders were entitled to the GUC distribution. Hedge funds poured into the units as a decent investment and took some would either say advantage of or assisted general unsecured creditors in being able to get out of their investments quickly at a discount.

This is not plan of reorganization appeals where we're looking to stay all of the implications of a confirmed plan. This is a GUC Trust, set up years ago, with approximately thirty -- $10 billion worth of value on account of what then we understood to be $30 billion worth of claims. That's how we all compute the 30 cents on the dollar distribution.

So when we look at situations where bonds were being contemplated in the context of an appeal of a plan, and consummation and avoiding irreparable injury in connection with equitable mootness, the kinds of damages that people were concerned about, the level of unscrambling the egg was really a lot different than what we're talking about here.

And, Your Honor, with all due respect to Ms. Rubin and her client and Ms. Newman and her client, what I don't

understand is what was wrong with my supposition. Take the money when the trust is ready to make a distribution sometime in mid-November. It's $135 million. What's wrong with telling me which hedge fund got how much of that 135, and getting and undertaking from them that if my appeal is successful and a court of competent jurisdiction finally directs them to return the money, I'm not banging my head against the wall, but I have an opportunity to present to that fund a letter of credit that says turn back the money.

And to take the wind out of everyone's sail on computing interest rates, which is by no small measure a difficult computation, what's wrong with saying whatever interest you earn, you keep? All this lost opportunity doesn't become theoretical anymore, it becomes actual. Earn what you're going to earn. All I want is a reasonable return on the money that you got that you weren't by court order supposed to have had. If a court determines ultimately on appeal you shouldn't have gotten the money, then you shouldn't have gotten the money, but you had the benefit of earning potential on that money. All I want back is two percent, which is dramatically lower than any figure they've ever presented.

And I think, Your Honor, the last point I want to make, and by the way, other than telling you, Your Honor, to assist Your Honor in preparing your decision, there are any number of pages I think Your Honor may want to look to. But

Your Honor has already indicated that we've each of us made our positions fairly well-known. I think the exercise here is take a look at what's a lost opportunity cost.

Their position is no, no, no, no, you need to determine what the best protective rate of interest is supposed to be. I don't see any authority for that proposition other than their inapposite cite to, for example, Adelphia, which Your Honor again knows very well is in the context of a stay pending appeal from a confirmation order where the Court quite correctly says that what we're looking for is a bond that will properly do justice to the potential damages that are going to be realized because the potential damages in unwinding a plan are hard to compute.

The damages from these hedge funds not getting their hands on $135 million, Your Honor, is a different exercise. Tell me what you're going to do with the money over what period of time, and either before the fact we'll try and guess what you earn, or after the fact we'll know what you earn.

My offer to them today is let's figure it out after the fact. Take the money. Invest it in whatever you want to invest in. I said Bolivian bonds. You know, there could be some really smart hedge fund guys out there that think that all of these four indices are nuts, that what we really ought to be investing in is going down to Atlantic City and betting on Trump being the Republican nominee. That's got great odds.

God bless them, they run hedge funds, they're worth billions. Let them make whatever investment they want. Let them make whatever returns they want. Give me the money back when a judge says give me the money back, and give it to me back with a very, very low rate of return. What's wrong with that?

The last point I thought I wanted to make, but I'm sort of losing my place here. Oh, we keep coming back to 240 some odd million dollars went out the door because of a strategic decision, and that's part of a Chateaugay factor and it's prejudicial.

I'm guessing that on appeal a Court may look at the 244 out of the ten billion that's already been distributed, or the 244 out of the 890 million of cash they currently have, or the 244 out of the accordion feature and say, you know, Weisfelner, you screwed up and you're never getting your hands on that money again. But how does that relate to the next distribution they want to make? And how do they overcome Your Honor's determination that had I spent the time and money arguing on that $240 million distribution, Your Honor would have held it up, quote, "in a heartbeat."

THE COURT: Well, Mr. Weisfelner, when I said what I said back then, I did not have the benefit of the evidence that I have now, nor the articulation of the legal issues.

MR. WEISFELNER: All of --

THE COURT: The law of the case doctrine is quite

clear that facts that later become known to the Court make arguments that might otherwise be said to be law of the case go out the window.

MR. WEISFELNER: And, Your Honor, you don't need me to say that, but that's absolutely true and I wasn't suggesting otherwise. My only point in raising it is I'm to be damned for having made that strategic decision way back when on the theory that had I moved for the relief, I would have been successful. I don't know that. My adversary certainly doesn't know that. We have Your Honor's commentary, but you're right, it was without the benefit of --

THE COURT: If you had moved to that relief, then Ms. Rubin or Ms. Newman might have said -- probably would have said -- matters very similar to what they've been telling me over the last couple of days.

MR. WEISFELNER: Correct. And, Your Honor, with all due respect to their position, and for the reasons I've historically articulated, if we ever get back to the notion of likelihood of success on the merits, I think I've explained to you, and I don't know that Your Honor needs to hear it again, why I think I'm going to be successful as to the accordion, as to the amount of cash currently on hand, and for that matter as to the 30-cent distribution that's already been made. And I can articulate those rationales independently.

As to the accordion feature, because there is no

possibility that the GUC Trust unitholders as currently situated will ever trigger the accordion. Therefore, our getting it, and our getting it exclusively, is a remedy that could have been fashioned and we believe will be fashioned by an appellate court, that has no adverse implications on the GUC Trust beneficiaries. But for the argument you heard that, you know what, it's going to require the GUC Trust to stay in existence longer than they want to because they're going to have to spend the time and the money making the distribution to these poor jerks that filed late claims because their due process rights were violated. Shame on them for keeping our doors open in our candy store for that much longer.

The argument with regard to the money that's currently on hand, Your Honor, I think I'd prevail on an appeal because Your Honor's equitable mootness determination was predicated on reasonable expectations. And it gets back to the hole in the evidence.

Your Honor, I had no basis to determine that the unitholders then or the unitholders now had any reasonable expectations about not being deluded by our plaintiffs. In fact, to the contrary, the record, every single statement in every one of the GUC reports from May of 2014 forward clearly articulated the risk -- or was it 2015 forward; '14 forward -- the risk of potential dilution from the recall.

And, Your Honor, I will tell you something that's

totally unsupported by the record or any evidence, it's just within my knowledge base and you can accept it reject it. Hedge funds --

THE COURT: Why would you tell me something in argument, especially on reply, that's wholly unsupported by the record?

MR. WEISFELNER: Well, because, Your Honor, I just think we can almost all of us take notice of it or I can call any hedge fund guy in the room to take the stand, and that is when the recall got noticed, guys who had hedge fund units started running their calculations all over again and sweating bullets about whether or not they'd have umteen billion dollars worth of additional competing claims.

And, Your Honor, as to the money that's already been paid out, again --

THE COURT: Well, if you're asking me to strike that remark, Ms. Rubin, to the extent it's necessary, I'm granting it.

MS. RUBIN: Thank you, Your Honor.

MR. WEISFELNER: And, Your Honor, the last point I want to make because I heard all these criticisms about our calculations that we handed up as part of our demonstrative -- and you want to know what? Ms. Rubin is absolutely correct, absolutely correct. This demonstrative did something unfair. When we presented the Plaintiff's mean we did it on a weighted

average, meaning each index got the same weight. Whereas the testimony you did get was that at a minimum you had to weight the Credit Suisse 47 percent, and because we didn't know any better, we divided the other three indices equally.

Well, Your Honor, only because he's that good at math and that fast at math, Mr. Steel recalculated the mean on a weighted average. And I'll represent to the Court that on a weighted average, the way Ms. Rubin wants me to weight it, 47/18/18, my 5.0325 percent jumps up to 5.09 percent.

Your Honor, with that, I have no further --

THE COURT: Okay. Thank you.

Ms. Rubin, you've got the same amount of time.

MS. RUBIN: Thank you, Your Honor. The first thing I'll say, Your Honor, is while I don't distrust Mr. Steel's mathematical abilities, he certainly is not been proffered here as an expert. We've had no basis to check those mathematical calculations on and I ask that Your Honor strike that from the record.

Let's return to some of the points that Mr. Weisfelner just made. Mr. Weisfelner made a point that the cases that we rely upon in terms of the calculations of lost opportunity costs or the appropriate amount of the bond are all about confirmation orders, and I want to challenge that on two fronts.

One, the cases that I rely upon the most in my brief

and throughout my argument is actually the BGI case. And there are three decisions in BGI on which I rely. One is Judge Glenn's 2012 opinion denying the first application for a stay pending appeal. The second is Judge Scheindlin's 2014 District Court opinion denying the second application for a stay of distributions pending appeal. And the third is the Second Circuit's opinion in 2014 in which it affirms the applicable mootness decision that Judge Glenn had made.

Now, it's fair to say those are not about the calculation a bond because in each of those instances, the courts found that the stay was not appropriate. But it's unfair to say that the cases on which we rely the most are about a confirmation order.

The BGI case is actually quite similar to this one. It's about a stay of distributions pending an appeal in a situation where the plan had already been substantially consummated. Your Honor, I can't think of a case that's more factually on all fours, at least within this circuit, than that one is. And I would encourage Your Honor to give that case a second look in terms of the stay here.

Now, Mr. Weisfelner then went on to talk about the --

THE COURT: That case being Marty Glenn's decision at the Bankruptcy Court level in Borders Books?

MS. RUBIN: Yes. And actually the second decision by Judge Scheindlin. So Your Honor may recall that there were two

distributions that the gift card holders sought to enjoin. The first one in 2012 was the first interim distribution and there were two gift card holders that sought to file late claims, first in their individual capacity and, second, on behalf of the putative class. Judge Glenn denied those motions to file late claims and for certification of a class. They then sought to stay the first interim distribution pending appeal of those orders.

THE COURT: Tell me, I thought their claims were disallowed.

MR. RUBIN: Those claims were disallowed, so they sought to file late claims both for themselves as individuals and again on behalf of the putative class. Those claims were disallowed. During their appeal of the disallowance of those claims, or rather the denial of their motions, they sought a stay of the first interim distribution pending that appeal. Judge Glenn denied that.

Judge Scheindlin's 2014 opinion deals, Your Honor, with the second interim distribution. And there was again a request for a stay pending appeal. Judge Scheindlin in a very -- in a much lengthier opinion goes through the factors why a stay was not warranted there, as well.

I rely on both of those opinions. I think particularly Judge Scheindlin's opinion offers some very helpful guidance on the weighting of the four preliminary

injunction factors and how they interrelate to one another, in particular the relationship between the irreparable harm factor and the likelihood of success on the merits. That's the decision in which Judge Scheindlin says:

> "Where you don't act with all diligence to protect your rights throughout a proceeding, you can't establish irreparable harm. There's no actual or imminent injury to you."

And that's the point I was trying to make about Mr. Weisfelner's claims. I accept that we agreed not to assert a timeliness objection. To me, what that meant was we weren't going to say that Mr. Weisfelner's clients couldn't meet the doctrine of excusable neglect for claims filed during what's defined as the interval.

I also didn't say that those seven people that Mr. Weisfelner represented at the time didn't have putative class claims. What I said was their putative class claims were in respect very strictly of the ignition switch defect and with respect to three particularly mentioned vehicles that had never been recalled.

I know this, Your Honor, because my firm went and tracked down each one of the five putative class complaints that was the subject of the objection that Mr. Weisfelner filed on April 22nd, 2014 because we wanted to understand what was the import of what we agreed to in terms of who the plaintiffs

were, what did we actually say we would or would not do.

This is not the first time that Mr. Weisfelner has accused me of having chutzpah in terms of my interpretation of that order. I took that accusation fairly seriously. I sought to educate myself. I don't believe there's anything wrong with what I've said today about the lack of irreparable harm to Mr. Weisfelner's clients.

But even if there is, my point was, Your Honor, Mr. Weisfelner seeks to represent millions and millions of plaintiffs. He's told you that, Your Honor. Those plaintiffs have economic loss claims predicated on the ignition switch defect that has been strictly defined in this Court to mean those people affected by the February and March 2014 recall.

He also represents leagues more in millions of plaintiffs who have technical what are called non-ignition switch defect claims. And my point was the folks that he represented at the time of the objection, they were only folks whose individual standing was based on the first two defects, not the tens of millions of additional people he now represents. I don't believe we have any agreement between us with respect to failure to assert a timeliness objection on behalf of those folks.

Let me go on, Your Honor. With respect to the likelihood of success on the merits, Mr. Weisfelner says that he expects to win with respect to the accordion feature because

the unit holders couldn't have possibly had an expectation that they would tap those assets.

And I think Mr. Weisfelner is missing the point. The expectation, as Your Honor put it in his decision, is that liquidating trusts are not meant to survive forever during the administration and distribution of money pending massive class actions. And that was the unit holders' expectations here.

And you shouldn't take my word for it, Your Honor. Exhibit FF to Ms. Newman's declaration in support of the unit holder and the GUC Trust's threshold issues brief -- and I'd be happy to cite the docket number to Your Honor -- is an analyst's report. And that analyst's report talks about the fact that in recommending that folks should buy the GUC Trust units, is an analysis predicated on an understanding of what reserves the GUC Trust has, administrative reserves, tax reserves, life of the trust. Those were all factors that GUC Trust unit holders considered in making their investment decisions.

So for Mr. Weisfelner to say, "Oh, they knew that there would be a list to them," well, they also knew that there was limited universal claims. They had certain expectations about how long the trust would last.

Those expectations would be upended if Mr. Weisfelner and his clients suddenly filed putative class claim that have to be decided by Your Honor whether they should be allowed,

whether the excusable neglect factors have been met, whether or not any of them are even known creditors.

We know that the ignition switch plaintiffs have qualified under Your Honor's ruling as non-creditors. We don't know that with respect to the non-ignition switch plaintiffs. Those are all things that are going to have to be determined in due course if they want to access this accordion feature based on the ruling by the Second Circuit.

Now, Your Honor, Mr. Weisfelner made an argument about the Tribune case, and I want to say a couple of things about that.

First, that's not a case on which the GUC Trust is principally relying. It's one fact that Mr. Weisfelner has made a lot out of in terms of examining our witness both at his deposition and at the evidentiary hearing.

And I would just point out that the rate of return here based on the same index that David Kurtz used as demonstrated by Exhibit F-1 to Mr. Scruton's declaration, the yield to worst for that same index used by David Kurtz, here would get you a rate of return of 7.17. That's still two plus points higher than the rate of return that Mr. Weisfelner has submitted to you as the appropriate one. And that's a rate of return that Judge Carey in his decision in Tribune called conservative.

THE COURT: And that's using the junk bond index?

MS. RUBIN: Yes, that's using the Bank of America, Merrill Lynch U.S. High Yield Master 2 Index, Your Honor.

Your Honor, you noted the philosophical difference between my position and Mr. Weisfelner's position. And I certainly don't disagree with that. And then you challenged Mr. Weisfelner to tell you why it's okay that they should post a bond that has the risk of being 50 percent wrong, or being wrong 50 percent of the time. And I note, Your Honor, he still hasn't cited any case before Your Honor that supports that position.

He's trying to shift the burden further, Your Honor, with a proposal that he's making that you should let the money go out and then it should be recaptured from the unit holders. That's an effort to distract from the law. There's no case that I know of that supports the proposal that he's making. There's certainly no case that I know of that supports posting a bond that has the real material risk of being wrong 50 percent of the time. And he goes on to talk about the fact that the hedge funds here are best equipped to bear the risk. Well, if the hedge funds really are the only investors in GUC Trust units, Mr. Weisfelner's prepared to accept that. And I'm not saying that they are or they aren't, Your Honor. You know that the GUC Trust has no way of knowing that.

But even if it's Mr. Weisfelner's own supposition that hedge funds represent the majority or the super-majority

of unit holders here, then the rate of return should go up, not down. The credits -- the proportion of the bond reflective of that Credit Suisse index, Mr. Weisfelner doesn't challenge that as a reasonable proxy, by the way, for the hedge funds. The proportion of the rate of return attributable to that index should go way up as well.

The final thing that I would say, Your Honor, is Mr. Weisfelner talks a big game about what his claims are, and the millions if not billions of dollars that his clients are entitled to get back.

Your Honor, I have no idea as I sit here today, nearly 18 months after I first made an appearance in this action, what the quantum of his claims even are. He dropped a footnote in his objection to our motion for liquidation. That's a brief that he filed on June 24th, Footnote 4, says that, quote, "In the near term, he's going to file a putative class proof of claim alongside a motion to withdraw the reference."

Well, he did the second, filed the motion to withdraw the reference. We know how that turned out. But he never did the other thing. I don't know why. But I'm still left here, as are the unit holders, --

THE COURT: Well, you and I and probably everybody in this room read Jesse Furman's decision on the withdrawal of the reference. I would have thought that most people agreed that

Jesse Furman ruled the way he did because on the issues that are going to be addressed in the next couple of weeks, principally putatives based on old GM conduct, imputation based on old GM conduct, or knowledge gathered by new GM, some or all of which may have come from old GM, and certain kinds of claims that allege things like -- whatever Plaintiff stuck in their complaints outside of those categories, relying on old GM conduct, were subject to my gatekeeper role because I knew what I had ordered back in 2009 and what I've been trying to accomplish in the judgment, you're saying something different here on a different kind of withdrawal of the reference.

You're saying whether I or my successor should be the guy who liquidates and fixes the amount of class proofs of claim here, or whether somebody who has other aspects of the MDL should be doing that. Isn't that a different withdrawal of the reference type of issue?

MS. RUBIN: I'm actually not saying that at all, Your Honor. So, let me be perfectly clear about what I'm saying. All I meant to suggest, Your Honor, is that Mr. Weisfelner made the representation to the Court that he was going to simultaneously file two things, a motion to withdraw the reference and putative class proofs of claim.

All I meant to suggest to Your Honor had nothing to do with the substance or the outcome. All I meant to say to Your Honor is Mr. Weisfelner did go ahead and file the motion

to withdraw the reference. Judge Furman decided it, as Your Honor just stated. He didn't file his class proof of claim. That is the part of it that I'm scratching my head about, and that is the part that leaves Ms. Newman and I sort of in a position of we don't know what the quantums of the claims are here.

How can the GUC Trust be expected to protect folks that aren't even contingent claimants, aren't even contingent beneficiaries, particularly when Your Honor has ruled that the equitable mootness doctrine inhibits those in the plaintiffs' position from ever accessing the past, present or future assets of the GUC trust? I represent the trustee fiduciary duties, Your Honor. That trustee is required under the terms of the plan and confirmation order to make required distributions on a quarterly basis. The burden is not respectfully on my client or on the unit holders. The burden was on Mr. Weisfelner to come before the Court and give evidence as to: one, the necessity of the stay; two, the lack of necessity for a bond. And he hasn't done either.

So respectfully, Your Honor, what we would submit the appropriate amount of the bond is -- and again, I didn't represent that this is Mr. Scruton's exact testimony. Mr. Scruton said that the $15.2 million in Exhibit B-1 of the supplemental exhibits was conservative based on the fact that he did not take account in his calculation of the weighted

average protection rate of two percent incentive and management fees for the hedge fund. We believe that that $15.2 million is the right place to start, and that an adjustment is necessary upward to account for those management fees.

And with that, Your Honor, I'll rest and thank you for your time.

THE COURT: All right. Although at one time I naively thought that I could give you a dictated ruling at the conclusion of legal argument, I don't think that's feasible. And I don't know if I can even give it to you tomorrow, although I do know that if I can't give it to you tomorrow I can't give it to you for a while thereafter. Am I correct that the date by which the rust contemplates its next distribution is November 15th, Ms. Rubin?

MS. RUBIN: Yes, Your Honor.

THE COURT: Am I also correct in my assumption that there's no material likelihood that you're going to make a distribution before November 15th?

MS. RUBIN: That's also correct, Your Honor.

THE COURT: Can I get that as an undertaking from the Trust?

MS. RUBIN: I believe you can, Your Honor.

THE COURT: All right.

MS. RUBIN: Subject to, of course, discussions with my client, who's not present in the courtroom today.

THE COURT: Well, you better confirm that --

MS. RUBIN: Very quickly.

THE COURT: I can easily give you guys comfort that you'll have plenty of time from me before November 15th, but it would distress me, to put it mildly, that if I delayed in issuing what's in substance a preliminary injunction based on a belief that there was no urgency in issuing the injunction, that my own reasonable expectations were dashed.

MS. RUBIN: I understand, Your Honor. One caveat I would raise is that certain preparations would need to be made. It's no small undertaking for the Trust to distribute $135 million in cash. We will make an undertaking to Your Honor that we will not distribute the cash prior to November 15th.

THE COURT: I don't care what preparations you take, as long as they can be put on hold without frustrating the Plaintiffs' desires until I've ruled.

MS. RUBIN: I understand, Your Honor.

THE COURT: Okay. Then we're adjourned for the day.

MR. WEISFELNER: Your Honor, I'm sorry to raise this. Just by way of question, Your Honor had asked counsel --

THE COURT: Come to a mike, please.

MR. WEISFELNER: -- the day before yesterday for --

THE COURT: Come to a mike, Mr. Weisfelner. You're usually more than loud enough.

MR. WEISFELNER: I was just wondering what happened

to Your Honor's inquiry. You asked for counsel at Akin to confirm to you that the hedge funds they represent are not par creditors. And I don't know that any of us have even gotten a response.

THE COURT: Ms. Newman.

MS. NEWMAN: Yes, Your Honor. We did discuss this with our client. The term "par investor" is not a term that's applicable to the GUC Trust units because they trade like an equity. There's no stated redemption for the units. They just trade based on the market price. So, there's no concept of a PARR or discount to PARR investor for the GUC Trust units. I can tell you that our clients were not creditors in the GM bankruptcy.

THE COURT: They were not initial creditors in initial privity with old GM, which caused them to become creditors.

MS. NEWMAN: That's correct.

THE COURT: Okay. That's sufficient for my purposes here.

MS. NEWMAN: Thank you, Your Honor.

THE COURT: Thank you.

(Concluded at 5:05 p.m.)

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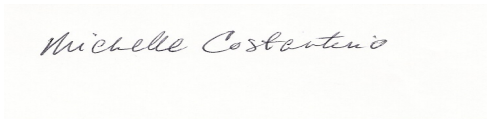
C E R T I F I C A T I O N

We, Michelle Costantino, Ilene Watson, and Lisa Luciano, court-approved transcribers, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



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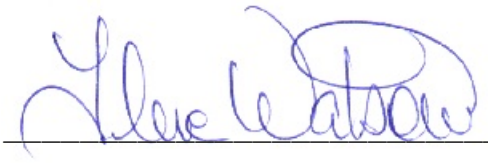
MICHELLE COSTANTINO, AAERT NO. 589 DATE: September 29, 2015

ACCESS TRANSCRIPTS, LLC



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ILENE WATSON, AAERT NO. 447 DATE: September 29, 2015

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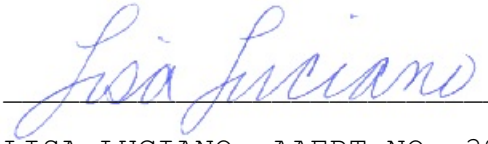

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LISA LUCIANO, AAERT NO. 327 DATE: September 29, 2015

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